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CURRENT TOPICS.

Before we permit the year 1880 to drift completely into the past, it is fitting to call to mind the names of the many eminent, and some distinguished, members of the bench and bar who must be enrolled in its necrology. The Federal Judiciary suffered in the loss of Judge Trigg, of the Western District of Tennessee, a man of strong practical sense, Judge Hays, of the District of Kentucky, and Judge Ketcham, of the Western District of Pennsylvania. Among these, too, should be mentioned ex-Judge Huntington, of the Court of Claims.

Wisconsin lost the brightest legal luminary of one of the best courts in the country in the person of Mr. Chief Justice Ryan.

Early in the year Mr. Chief Justice Church, of the New York Court of Appeals, died. An able lawyer and learned judge, he was conceded to be the master mind of the court. The New York Supreme Court, too, lost Mr. Chief Justice Curtis, and the Marine Court Judge Sinnott. The Alabama judiciary suffered in the death of Associate Justice Manning, of the Supreme Court. Among those less widely known, whose deaths are to be chronicled, are Chancellor Pirtle, in Kentucky, and Judge Montague, of Virginia.

The bar suffered much less severely, the only names of note which have attracted our attention being those of Mr. Henry Wharton, of Philadelphia, ex-Judge Alfred Blackman, of Hartford, Connecticut, and the distinguished, learned and accomplished Isaac Grant Thompson, editor of the *Albany Law Journal*, who had probably spent more years in the harness than the editor of any other legal publication in the country.

The English bench also experienced severe losses. The death of Lord Chief Justice Cockburn, although he was probably in no sense of the word a great lawyer, is not an event which will pass without effecting great changes. The Chief Baron of the Exchequer, Sir Fitzroy Kelly, and Alfred Henry Thesiger, one of the judges of the English Court of Appeal, and Sir William Erle, one of the justices of the Common Pleas, are among the others who have ceased forever their judicial labor.

Among the English bar the only names of note we find among the dead of 1880, are those of John Humphrey Parry, a distinguished sergeant at law, and the famous Dr. Kinealy who fought the battles of the Tichborne claimant with more enthusiasm than discretion.

In discussing in our last number the measures of reform which have been set on foot in many of the States, with a view of facilitating the transaction of business in the courts, and of avoiding the delays and reducing the expenses of litigation, we called attention to what we consider one of the chief causes of the difficulties under which our appellate courts labor, to-wit: the imperfect manner in which, in the very great majority of instances, causes are tried at *nisi prius*. We did so merely as a hint to arouse the intelligent thought of the leading minds among our readers on this topic. We do not arrogate to ourselves the province of formulating a method by which these evils may be remedied and recommending its adoption. If we can succeed in calling the attention of the bar to some of them, we shall conceive that our task is accomplished and our responsibility discharged.

In pursuance of this idea then, we would suggest that no scheme of reform can be considered complete which shall fail to remedy the evils attendant upon the present system of transacting business in magistrates' courts. It may, at first blush, seem to be a trifling matter, because of the limited jurisdiction of these courts. But a little reflection will show that an immense mass of litigation, when taken in the aggregate, passes through the hands of these officers, and the fact, that a great majority of litigants in such courts are poor and unable to indulge in the luxury of appeals, and writs of *certiorari*, and such remedial process for the correction of errors, is only an additional reason why they should be organized in such a manner as to do, as nearly as possible, exact justice in the first instance. In addition to the many instances in which the

litigant is unable to appeal from an unjust judgment, and, consequently, suffers a wrong, there are numberless cases in which he does so appeal, and thus the dockets of the higher courts are crowded with causes involving trifling amounts and no particular legal principle of importance. In many instances, where the courts of record and the magistrates have concurrent jurisdiction, cases which ought, for the good of the parties and the convenience of the public, to be settled in the court of a justice of the peace, are brought in the first instance in the court of record as the shorter method of the two. The cause of all these evils we conceive to be two-fold. In the first place, in many, if not all of the States, it is not a necessary qualification for the office that the candidate should be a lawyer; and second, that in most instances it is provided by law that the compensation of the justice shall be made by means of costs to be paid by the unsuccessful litigant; whereby it comes that the judgment is usually against him that is best able to pay the costs. We think that justices should be members of the bar, and that they should be compensated by fixed salaries for their services.

We are well aware that any plan for carrying these reforms into effect would be met by the objection that they are impracticable, because the justices and the constables are a political power in the land. But we would remind any who are inclined to be disheartened on that account, that there are many indications that public opinion is already educated up to the point of putting into effect radical changes in our various systems of procedure. It seems to be only a question whether the bar, who alone are qualified for such a task, are to lead and direct the movement, or are to be driven by it.

To recapitulate, we think that any scheme of reform ought to embody these features: 1. Courts by magistrates, who shall be chosen from the profession and shall be compensated by salaries. 2. *Nisi prius* courts, held by judges who shall have less to do, greater compensation and longer terms of office. 3. A Supreme Court, strong enough in numbers and material to do its work without inconvenience—with terms of office long enough, and salaries sufficient to make it practicable to obtain the very best talent for the positions.

We see from the *Law Times* that the Employers' Liability Act, as it is termed in England, which went into effect on the 1st inst., is already beginning to produce results, though not of that nature which was expected and hoped by its friends. This act, it may be briefly stated, so far changes the law of master and servant, as to make the former liable for personal injuries received by the latter in the course of his employment, through the negligence of a fellow-servant. It is provided, however, that special contracts may be made in which this liability may be released.

Says the *Law Times:* "The Employers' Liability Act does not appear to give that amount of satisfaction to working men which was expected. At any rate, the principal mining delegate of the South Staffordshire and East Worcestershire district says: 'A great mistake has been made by some persons in urging on the present Government to pass and bring into operation the Employer's Liability Act, for which the working men had made so little request and were so ill prepared for the change it has brought about.' The latter statements are somewhat strange, after all the discussion which took place before the Act was passed. It is nevertheless a serious matter for workmen to find an employer, like the Earl of Dudley, giving his employees notice that on and after January 1 next, his subscriptions to medical attendance and support to the sufferers, and allowances to widows and fatherless children, will be withdrawn." Judging from this extract, it would not seem an improbable guess, that the act was the work of impractical philanthropists who had failed to study all the conditions of the problem. The measures of retaliation on the part of the employers are natural, and perhaps right. If the subscriptions referred to were a recognition of a moral obligation to care for employees injured by the negligence of fellow-employees, it is well that the act has converted that moral obligation into a legal liability. If they were not such a recognition, then they constituted a charity, incompatible with the relation of employer and employee, and such as an American workingman would hesitate to accept. The operation of the act will be watched by many persons in this country with great interest.

CHANGE OF DOMICIL.

Domicil of origin is distinguished from domicil of choice. Domicil of origin is the domicil which every one receives at birth, while domicil of choice is that which is acquired by the voluntary act of the party. Changes from domicil of origin to domicil of choice, or from one domicil of choice to another of choice, often involve important and interesting inquiries, to some of which attention is invited. In a former article[1] we had occasion to consider the law of domicil in its relation to married women, infants and persons under guardianship. It then appeared: 1. That a married woman could not acquire a domicil of choice separate from that of her husband—that her domicil could only be changed by her husband, except in those cases in which he had been guilty of such dereliction of duty as to entitle her to a divorce. 2. That an infant could not change its domicil. That the domicil could only be changed by the father in his life time, or the mother during her widowhood. 3. It was thought that the guardian could change the domicil of the ward, if done with no fraudulent intent. The consideration that was then given to the subject makes it unnecessary to enter into any discussion of changes of domicil by persons belonging to the above classes, and attention is called rather to changes of domicil by persons who are *sui juris*.

The capacity of any person *sui juris* to change his domicil being conceded, the question presented is, under what circumstances is a change considered to have been made. And in the first place we find it laid down that no person can be at any time without a domicil somewhere. "It is," says Lord Westbury, "a settled principle that no man shall be without a domicil." In the same case Lord Chelmsford said, "it is an undoubted fact that no man can be without a domicil."[2] If no man can be without a domicil, it necessarily follows that the domicil of origin must continue until a domicil of choice is acquired.

One whose domicil of origin was in Jamaica, after he came of age sold his estates in the island and left, to use his own expression, "for good." He then went to Scotland, remaining there for some time, but without making up his mind whether to settle there or not. The court of session held that he had acquired a Scotch domicil, but the House of Lords reversed their decision, holding that notwithstanding he had abandoned Jamaica "for good," his domicil still continued there, as he had not as yet acquired one elsewhere.[4] "It is impossible to predicate of him," so it was said, "that he was a man who had a fixed and settled purpose to make Scotland his future place of residence, to set up his tabernacle there, to make it his future home. And unless you are able to show that, with perfect clearness and satisfaction to yourselves, it follows that the domicil of origin continues." The above case not only illustrates the principle that the domicil of origin is retained until a new domicil is actually acquired, but it shows that this principle holds good even in those extreme cases in which a party has finally abandoned the place of his domicil with no intention of ever returning to it again. We are, therefore, prepared to find that the courts have, in numerous instances, laid down the rule, that one's domicil is not lost or changed by a mere temporary absence, no matter how long continued, provided there exists an *animus revertendi*.[5] The doctrine of the first principle, that domicil of origin can not be lost by a final abandonment with an intention of never returning, may be farther illustrated by a case decided by the Supreme Court of Mississippi, where it was held that if an invalid sells his homestead and household property, and leaves his domicil of origin for purposes of traveling so as to regain his health or prolong his life, and shortly after dies on his travels, without having acquired any permanent abode at any place, the

[1] 11 Cent. L. J. 421.

[2] Udny v. Udny, L. R. 1 Sc. App. 441, 457.

[3] Udny v. Udny, *supra;* Bell v. Kennedy, L. R. 1 Sc. App. 307, 320; and, see, Glover v. Glover, 18 Ala. 367; Hairston v. Hairston, 27 Miss. 721; Sanderson v. Ralston, 20 La. Ann. 312; Mitchell v. United States, 1 Wall. 350; Desmare v. United States, 93 U. S. 610; Gilman v. Gilman, 52 Me. 165, 176; Moore v. Wilkins, 10 N. H. 452, 456; Hood's Estate, 21 Pa. St. 106; Hindman's Appeal, 85 Pa. St. 466, 469; Kirkland v. Whately, 4 Allen, 464; Bangs v. Brewster, 111 Mass. 385.

[4] See Bell v. Kennedy, *supra*.

[5] State v. Judge, 13 Ala. 805; Boyd v. Beck, 29 Ala. 703; Griffin v. Wall, 32 Ala. 149; Dow v. Gould, etc. M. Co. 31 Cal. 629; Risewick v. Davis, 19 Md. 82; Crawford v. Wilson, 4 Barb. 505, 523; Bradley v. Lowry, 1 Speer's Eq. 3, 14; Case v. Clarke, 5 Mason, 70; State v. Daniels, 44 N. H. 383; Charlton County v. Moberly, 59 Mo. 238.

domicil of birth is not lost, although he had no intention of ever returning to it.[6] The second principle above stated, that domicil is not lost or changed by a mere temporary absence, may be illustrated by the well-known case of Sears v. City of Boston,[7] decided by the Supreme Judicial Court of Massachusetts. A native of Boston had left Massachusetts for France. He took his family with him and hired a house for a year in Paris, having leased his own house and furniture, for a year, in Boston. The court held that while his residence was in Paris, his domicil continued to be in Boston, and said: "If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished, in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties. Love v. Cherry,[8] decided by the Supreme Court of Iowa in 1868, is an extreme case which well illustrates this same doctrine. The facts of the case were as follows: The plaintiff was, in 1860, domiciled in Iowa. During the latter part of that year she left Iowa for Texas, for the purpose of visiting a daughter residing there, and also hoping to collect, before her return to Iowa, a sum of money due to her from the estate of a deceased relative who had died in Texas. Upon her arrival in Texas she learned that the estate was unsettled, and she thereupon determined to remain until she could get the money which was coming to her. About that time Texas passed an ordinance of secession, and the rebellion breaking out, it became difficult, if not impossible, for her to return. In December, 1861, the administrator of the estate, in which she was interested, resigned and left the State, whereupon she determined to take up her residence there, and secure an appointment as administratrix of the estate. She resided in Texas until 1866, when she came North and resided in Illinois, where she was still residing when the action was commenced. She had thus been absent from Iowa between seven and eight years, six of which were spent in Texas. But the court held that her domicil still continued to be in Iowa, because of an ultimate intention she entertained of sometime returning to Iowa. It will not do to infer, however, as one easily might from the above case, that in all cases the cherishing of an ultimate intention of sometime returning will prevent the acquiring a new domicil. For instance, we find the Supreme Court of Missouri asserting that a domicil may be changed, although the person on departure cherishes a secret purpose of returning at some indefinite time in the future.[9] And in Tennessee the court says, that a floating intention to return at some future period will not defeat the acquisition of a new domicil.[10] And in Massachusetts it is said: "An intention to return, however, at a remote or indefinite period, to the former place of actual residence will not control, if the other facts which constitute domicil, all give the new residence the character of a permanent home and place of abode."[11] So in Maryland we find the court declaring that the person's purpose "need not be fixed and unalterable" in order to change his domicil, and that "a floating intention to return to his former place of abode at some future period," will not defeat it.[12] So in an English case we find one of the judges saying: "I think, however, it appears that he had contemplated the possibility of returning to India. But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum*, in order to establish a domicil? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention, or expression of intention, prevented a man having a fixed domicil, no man would ever have a domicil at all, except his domicil of origin."[13]

This leads us to inquire, under what circumstances is a domicil of origin lost, and a

6 Still v. Woodville, 38 Miss. 646.
7 1 Met. 250.
8 24 Iowa, 204.

9 Johnson v. Smith, 43 Mo. 499.
10 Stratton v. Brigham, 2 Sneed, 420. See, also, Harris v. Firth, 4 Cranch, C. C. 710.
11 Hallett v. Bassett, 100 Mass. 167.
12 Ringgold v. Barley, 5 Md. 186, 193.
13 Attorney-General v. Pottinger, 30 L. J. Ex. 284, 291.

domicil of choice acquired? And the answer to the inquiry is, that a domicil of choice is acquired by the combination of residence with the intention of permanently or indefinitely remaining at the place of residence. Or, as it is sometimes expressed, there must concur both the fact of residence (*factum*), and the intent (*animus manendi*). And where either of these is wanting, a new domicil can not be acquired.[14] There must be a union of intent and actual bodily presence. "We are all agreed," said Lord Jeffrey, "that to constitute a domicil, there must be the fact of residence, * * * * and also a purpose on the part of (D.) to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary."[15]

Where a party sold his homestead in Iowa, boxed up his household furniture, sent his family to Kansas with the intent of making that State his future home, he having remained in Iowa with the household goods, it was held by the Supreme Court of Kansas that, notwithstanding the intent to make the change, and notwithstanding the fact that, in pursuance of such intent, the wife and children had actually arrived in Kansas with trunks containing their personal clothing, no change of domicil took place, inasmuch as the husband had not reached the State. "Had the defendant accompanied his wife and children to Kansas, and remained there, though for ever so short a time, if long enough to establish them in a new home, even though such new home had been a boarding place in the house of relatives, then indeed the intent might have been effectual in giving character and significance to the act. But we cannot think that the intent of the husband to follow his family to Kansas at some future time, had the effect of giving him a legal residence in this State, months before he had set foot upon her soil. Intents and purposes are subject to change, and are seldom to be taken as the equivalent of substantial deeds." So it was held that no change of domicil occurred, as "fact and intent" did not concur.[16] On the other hand, reference may be made to a case decided in the Supreme Judicial Court of Massachusetts, in which the facts were as follows: The plaintiff was a shipmaster, whose domicil of origin was at A, but most of whose time was spent at sea. In 1867, he left his domicil in A, and went to sea with his wife, intending to make his home in the town of B. In pursuance of this intent he, in 1869, sent his wife to B, where she arrived in February. He was not personally present in B, until July of the same year, but the court held that he was domiciled there as early as May of that year. "By sending his wife to B, with the intent to make it his home, he thereby changed his domicil. The fact of removal and the intent concurred. Although he was not personally present, he established his home there from the time of his wife's arrival."[17] But the rule is, that an old domicil is not lost, nor a new one gained, by mere intention, unaccompanied by removal and actual residence.[18] "A mere intention to remove permanently, without an actual removal, works no change of domicil; nor does a mere removal from the State, without an intention to reside elsewhere."[19]

But where a change has actually been made, *animo et facto*, the old domicil is at once lost, and a new one is gained, at the same time. "Length of time will not alone do it; intention alone will not do it, but the two taken together do constitute a change of domicil. No particular time is required, but when the two circumstances of actual residence and intentional residence concur, then it is that a change of domicil is effected."[20] And this intent must be a definitely formed one.[21] "The time may be shorter or longer, according to the circumstances."[22] "In all cases, the question whether a person has or has not acquired a domicil, must depend mainly upon his actual or presumed intention. * * *

[14] Udny v. Udny, L. R. 1 Sc. App. 441, 457, 458; Maltass v. Maltass, 1 Rob. Ecc. 67, 73; Jopp v. Wood, 4 De. G., J. & S. 616, 621, 622; Forbes v. Forbes, 23 L. J. (Ch.) 724; McClerry v. Matson, 2 Ind. 79; Burgess v. Clark, 3 Ind. 250; Hairston v. Hairston, 27 Miss. 704; Adams v. Evans, 19 Kas. 174; Stiles v. Lay, 9 Ala. 795; White v. White, 3 Head, 404; Layne v. Pardee, 2 Swan, 232; Harvard College v. Gore, 5 Pick. 370; Gilman v. Gilman, 52 Me. 177; Stockton v, Staples, 66 Me. 197; Ensor v. Graff, 43 Md. 291; Wilkins v. Marshall, 80 Ill. 74.

[15] Arnott v. Groom, 9 D. 142.

[16] Hart v. Horn, 4 Kas. 232.

[17] Bangs v. Brewster, 111 Mass. 385.

[18] Maddox v. State, 32 Ind. 111.

[19] Hindman's Appeal, 85 Pa. St. 466, 469.

[20] Collier v. Rivaz, 2 Curt. 855, 857.

[21] Walker v. Walker, 1 Mo. App. 404.

[22] Hairston v. Hairston, 27 Miss. 721.

The apparent or avowed intention, not the manner of it, constitutes domicil."[23]

It was at one time supposed that in order to work a change of domicil, it was necessary that the person should intend to change his allegiance; but this cannot be considered to be the law. "According to one view," says Wickens, V. C., "it is sufficient to show that he intended to settle in a new country; to establish his principal or sole and permanent home there, though the legal consequences of so doing, on his civil *status*, may never have entered his mind. According to the other view, it is necessary to show that he intended to change his civil *status*, to give up his position, as, for the purposes of civil *status*, a citizen of one country, and to assume a position as, for the like purposes; the citizen of another. This stricter view is supported by opinions of great weight; amongst others, by the Lord President in Donaldson v. McClure;[24] that of the Lord Chief Baron Pollock, in Attorney-General v. De Wahlstatt,[25] and by some expressions used by the late Lords Cranworth and Kingsdown. * * * But I cannot satisfy myself that the stricter rule, as I have called it, can be considered as the law of England. It never was, I believe, the law of any other country, except, perhaps, Scotland, or recognized as law by any of the text-writers of European authority who have dealt with questions of domicil; and it is difficult to believe that the law of England has drifted so far from the general principles on which it professed to be founded, and which it always professed to follow."[26]

The rule being that a domicil once acquired is presumed to continue,[27] it necessarily follows that where a change of domicil is alleged to have been made, the burden of proving that such a change has been made, rests upon the party making the allegation.[28] But the doctrine that a domicil once acquired is presumed to continue, is said in a recent case not to prevail when its effect would be to impose upon the party the character of an enemy to his Government.[29] And in determining the question of domicil, the declarations of the party "have always been received in evidence when made previous to the event which gave rise to the suit. They have been received in the courts of France, in the courts of England, and in those of our own country."[30] In Hood's Estate,[31] the Supreme Court of Pennsylvania say: "Where a person removes to a foreign country, settles himself there and engages in the trade of the country, the presumption in favor of the continuance of the domicil of origin no longer exists." In a recent case, the same court say that where a person sells all his real estate, gives up all his business in the State in which he had lived, takes his movable property with him and establishes his home in another State, such acts, *prima facie*, prove a change of domicil.[32]

Where a man is the head of a family and a house-keeper, his domicil is presumed to be where his family reside.[33] But the residence of a married man's family is not necessarily his domicil.[34] In Ennis v. Smith,[35] the Supreme Court of the United States answer the question as to what amount of proof is necessary to change a domicil of origin into a *prima facie* domicil of choice, by saying that "It is residence elsewhere, or where a person lives out of the domicil of origin. That repels the presumption of its continuance, and casts upon him who denies the domicil of choice, the burden of disproving it. Where a person lives, is taken, *prima facie*, to be his domicil, until other facts establish the contrary. A removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time, is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, it does change the domicil. The result is,

[23] Ibid.
[24] 20 Sc. Sess. Cases (N. S.) 307.
[25] 3 H. & C. 374.
[26] Douglas v. Douglass, L. R. 12 Eq. 617, 644; see Udny v. Udny, L. R. 1 Sc. App. 441; Brunel v. Brunel, L. R. 12 Eq. 298.
[27] Glover v. Glover, 18 Ala. 367.
[28] Hood's Estate, 21 Pa. St. 106; Ennis v. Smith, 14 How. 400, 422; Desmare v. United States, 93 U. S. 610.
[29] Stoughton v. Hill, 3 Woods, 404.
[30] Ennis v. Smith, 14 How. 400, 422, and cases there cited.
[31] 21 Pa. St. 106, 116.
[32] Hindman's Appeal, 85 Pa. St. 466, 469.
[33] Yonkey v. State, 27 Ind. 236.
[34] Pearce v. State, 1 Sneed, 63; Exchange Bank v. Cooper, 40 Mo. 169; Hairston v. Hairston, 27 Miss. 721.

that the place of residence is, *prima facie*, the domicil, unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place."

The above case of Ennis v. Smith involved the question of Kosciusko's domicil. It was urged on the one hand that his domicil was in France, he having resided there after his exile from Poland. On the other hand, the theory was advanced that his domicil still continued to be in Poland, inasmuch as he was a forced exile from that country, and had never abandoned the hope of returning to Poland when the political condition of the country should permit him to resume his rights as a citizen of it. The court held that he had a French domicil, as he continued to remain in France after he could have returned to Poland. Where a residence is purely compulsory, and is not continued after it ceases to be compulsory, it seems no domicil is acquired.[36] So, according to Bullenois, the French jurists regarded the fugitives who accompanied James II. to France, as retaining their English domicil.[37] By the Roman law, a perpetual exile transferred his domicil to the place of banishment; but it is said to have been otherwise when the banishment was temporary.[38]

If a person, having acquired a domicil of choice, abandons it with the intention of resuming his domicil of origin, it is said that the domicil of origin revives as soon as the former domicil is abandoned, and before he arrives at the domicil of origin.[39] But suppose the domicil of choice is abandoned without any intention of resuming the domicil of origin, and without any definite conclusion having been reached as to the place of final settlement? Then the question is presented whether the domicil of origin revives, or whether the domicil of choice continues until the new domicil is actually acquired *animo et facto*. It seems at first to have been held in England, that a domicil of choice, like a domicil of birth, was retained until another was actually acquired. That where A, whose domicil of origin was English, had a domicil of choice in France, he continued to retain his French domicil, notwithstanding he had left France for good, having no intention of returning to England, or of settling in any country whatever. That, as a matter of law, his French domicil of choice continued until he settled in fact in some other country, intending to remain there permanently.[40] The English courts, however, have since abandoned this view of the law, and it is now laid down that a domicil of choice is abandoned when the individual leaves his adopted country, with no intention of again returning to permanently reside therein, and that he thereupon resumes the domicil of origin, which continues as his domicil until he actually settles in another State or country, thereby acquiring a new domicil of choice.[41]

We may be allowed, owing both to the importance of the question, as well as to the prevalent uncertainty in reference to it, to quote the following from Lord Westbury's opinion in the case last above cited: "Expressions are found in some books," he says, "and in one or two cases, that the first or existing domicil remains until another is acquired. This is true if applied to the domicil of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicil of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicil has, *animo et facto*, been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may, if he domicils himself in Holland, acquire and have the *status civilis* of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land; but if he breaks up his establishment, sells his house and furniture, discharges his servants and quits Holland, declaring that he will never return to it again, and taking with him his wife and children for the purpose of traveling in France or Italy in search of another place of residence, is it meant to be said that he carries his Dutch domicil, that is, his Dutch citizenship, at his back, and that it

[35] 14 How. 400, 422.
[36] De Bonneval v. De Bonneval, 1 Curt. 856, 864.
[37] Traite de la Realite et Personalte des Statuts, t. I, til. ii.. c. 3.
[38] L. 22, § 3; L. 27, § 3; See Merlin Rep. de Jur. Dom. iv.
[39] Allen v. Thomason, 11 Humph. 536. See White v. Brown, 1 Wall. Jr. 217, 265.
[40] Munroe v. Douglas, 5 Madd. 379.
[41] See Udny v. Udny, L. R. 1 Sc. App. 441.

clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity, and, on the contrary, much reason in holding that an acquired domicil may be effectually abandoned by unequivocal intention and act; and that when it is so determined, the domicil of origin revives, until a new domicil of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing, lived for twenty years after he had finally quitted Holland, without acquiring a new domicil, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition, supposed to be authorized by one or more decisions, involves absurd results, there is great reason for believing that no such rule was intended to be laid down." The Supreme Court of Connecticut draws a distinction, and says that this principle has no application when the question is between a native and an acquired domicil, where both are under the same national jurisdiction.[42] This decision is based upon Munroe v. Douglas, *supra*, which was overruled in Udny v. Udny, *supra*. We do not think, however, that the court ever intended, in Munroe v. Douglas, to sanction the conclusion reached in Connecticut, as Sir John Leach expressly declared that he could "find no difference between an original domicil and an acquired domicil." All that was decided in that case was, that an acquired domicil would be retained until another was in fact acquired, and that the domicil of origin would not revert.

HENRY WADE ROGERS.

CITY ORDINANCES AFFECTING STREET RAILROADS.

While the authority for the construction of street railroads is derived from the legislature of the State, they are subject to the control of the municipal corporation, where not otherwise prescribed for by the acts of incorporation.

That they have not the exclusive right to the streets over other vehicles, is well settled; that they have not the exclusive right to the use of the streets over other street railroads, is also established law. It was laid down in an early case, (The Brooklyn, etc. R. Co. v. Brooklyn City R. Co., 33 Barb. 420, 1861), that when the rails of a company were constructed, so as to cover the line of another road, no injunction could be obtained to restrain the one company from crossing the track of another, as it was held not to be an appropriation of the property by the former company, but a mode of exercising the public right of travel over a highway; and in subsequent cases (The Brooklyn City, etc. R. Co. v. The Coney Island, etc. R. Co. 35 Barb. 364, 1861; The New York, etc. R. Co. v. Forty-second St., etc. R. Co. 50 Barb. 285), a similar doctrine was established, where it was declared that street railroads had not the exclusive right to the use of the streets over other street railroad companies.

But one company has not the right to the use of the tracks of another without the consent of the former, or the authority of the legislature therefor decreeing compensation to the company. Sixth Ave. R. Co. v. Kerr, 45 Barb. 138 (1864); Metropolitan R. Co. v. Quincy R. Co. 12 Allen, 262 (1866); Jersey City, etc. R. Co. v. Jersey City, etc. R. Co. 20 N. J. Eq. 61 (1869). The law upon the subject of the right of a company to the use of the streets was laid down in a recent case corroborating the above decisions. In that case the authority for the construction of a street railway was given by the legislature over such streets as the city council and company would agree upon; and by contract with the company the city authorized it to build and operate railways on certain designated streets. Subsequently another road was incorporated with power and privileges similar to those of the former, and commenced to construct tracks upon some of the streets embraced in the contract between the city and the former company. An injunction being asked to restrain such construction was denied by the chancellor, who held that neither the charter of the company, nor the contract with the city, gave the company the sole and exclusive right to build and operate railways on those streets, and no such exclusive right could be implied; the streets were dedicated to the use of the public, and the legislature could not be presumed to have intended to give any individual, whether natural or artificial, the right to use them in a particular way, to the exclusion of such other persons as it might see proper afterwards to permit to use them in a similar manner. Covington St. R. Co. v. Covington, etc. St. R. Co., 11 Cent. L. J. No. 17, 10 Ky. Add. 17. How far and in what manner a city corporation may regulate the control of street railroads, may be gathered from the terms of the charter of incorporation, or in the absence of conditions, from adjudicated cases.

It therefore has no power to authorize the extension of a city railroad, unless such extension is necessary to the enjoyment of a previously valid

[42] First Nat. Bank v. Balcom, 35 Conn. 351.

grant (People v. Third Ave. R. Co., 45 Barb. 63, 1865; s. c. 30 How. Pr. 121); or unless the charter of incorporation so provides. South Boston R. Co. v. Middlesex R. Co., 121 Mass. 485. And where a railroad company being authorized by grant from the legislature to construct and operate a railroad through the streets of a city, and the common council of the city having given its assent to the construction of the road by the company upon a route designated in its charter on certain conditions, it was held that the common council had no power by resolution to annul or impair the grant to the company on account of its failure to complete the road within the time limited by the conditions annexed to the assent of the common council; that the omission did not *ipso facto* determine the estate, but exposed it to be determined at the election of the grantor. Brooklyn Central R. Co. v. Brooklyn City R. Co., 32 Barb. 358, 1860. As in the case of a franchise in which a forfeiture was provided for by statute, the title to the thing forfeited immediately vests in the State upon the commission of the offeuse or the pending of the event for which the forfeiture is declared (Oakland R. Co. v. Oakland, etc. R. Co., 45 Cal. 365, 1873); but the city was powerless to declare such forfeiture, or determine the rights thereby abrogated by ordinance, unless so authorized by statute. Neither have the corporate authorities power to confer upon individuals by contract, for an indefinite period, the franchise to construct and operate a railroad (Milhau v. Sharp, 27 N. Y. 611, 1863); and where the charter granted by the General Assembly is silent as to the time of its continuance, it will expire thirty years from its date. West End, etc., St. R. Co. v. Atlanta St. R. Co., 49 Ga. 157, 1873.

An ordinance to pave between the tracks of a railway company with Nicholson or concrete pavement, has been held to be an unreasonable regulatiou, and unenforceable where the company was incorporated under an act of the legislature which provided that the "city shall have no power to regulate passenger railway companies, unless authorized so to do by the laws of this commonwealth expressly in terms relating to railway companies in the City of Philadelphia; provided, that nothing contained in this act shall be construed to release the said company from keeping in good repair the streets on which their rails are laid, and from paying to the city the additional cost of constructing sewers." Act, 11 April, 1868. Philadelphia v. Empire Ry. Co., 3 Brews. 570.

An ordinance to pave between tracks has been held not to include double tracks, where the company was organized under an act of the legislature, providing that "All persons or corporations owning and maintaining, or operating railroads heretofore or hereafter constructed in the city and county of San Francisco, for the transportation of passengers in cars drawn by horses, shall keep the spaces between the rails in thorough repair, by paving, planking or macadamizing the same, as required by the board of supervisors of said city and county; and shall not be required to pave, plank or macadamize any portion of the street outside of the track of such road, etc." Laws 1866, p. 850. Robbins v. Omnibus R. Co., 32 Cal. 472. But an ordinance to pave between the tracks and for a distance of eighteen inches outside of each track, and cause the snow to be removed so as to afford a safe and unobstructed passage to sleighs and wagons, and to fully indemnify and save the city harmless from any and all claims of damages for which it might become liable to pay by reason of the construction or working of the road, etc., has been held effective and enforceable in a case where a passenger received injuries by the upsetting of a sleigh by the neglect of the company to remove the snow from the outside of its track, and sued the city therefor, the court holding that the company, having been notified to defend and declining to do so, was liable in an action by the city to recover the amount of the judgment. Mayor v. The Troy, etc. R. Co., 3 Lans. 270. And it has been held that, notwithstanding an equal obligation rests upon the corporation to keep the streets on which the tracks are laid in repair, the company is liable in damages for injuries arising from defects in the track, caused by neglect of the city to keep the street in repair. Fash v. The Third Ave. R. Co., 1 Daly (N. Y.) 148. As where a spike projected in a rail, being left exposed by the sinking of the pavement, and the plaintiff's carriage coming in contact with the projection, plaintiff was thrown out and injured, it was held wholly immaterial whether the projection of the spike resulted from the failure of the city corporation to repair the street in the locality of the accident, as the injury to plaintiff resulted from defendant's permitting the spike to project.

And so in an action brought in the marine court to recover injuries to a horse from alleged defective laying of a rail on defendant's road, the latter was held responsible for the accident, even though the municipal authorities were also negligent to the same extent in improperly paving the street. Carpenter v. Central Park, etc. R. Co., 11 Abb. Pr. (N. S.) 416.

With regard to the payment of license fees by street railroad companies for the privilege of running their cars over the streets of cities, or the imposition of an additional tax therefor, it would appear from the authorities that municipal corporations have not the right to exact any license fees or impose any additional taxes upon street roads without legislative authority conferring this right upon the city. This authority, however, may be implied from the provisions of the act of incorporation. As where a company was organized under an act which provided that "the company may construct lines of railway within such streets as it may consider beneficial to the interests of the company, and to which the city council of the

city may consent, authority for which is hereby given to said council to make an agreement therefor, etc.," and the city council passed an ordinance providing the terms and conditions by which street railroads might be run within the city limits and further, that "the franchise for street railroads, as provided for in said ordinance, be granted to any responsible company who will pay into the city treasury the largest bonus for the same, etc.;" it was held that under this ordinance, an agreement by the company with the city, by which it was permitted to lay down its track upon certain streets by giving bond stipulating for a compliance on its part with the city ordinance, and among other things agreeing to pay the city the sum of $250 for a period of twenty-five years as a bonus for the privilege granted it, was valid and enforceable at law. Covington St. Railway v. Covington, 9 Bush. (Ky.) 127, 1872. And where the company has accepted a charter providing that it pay a license-fee to the city, it is precluded from questioning the validity of the burden so imposed, although other companies by virtue of a contract with the city paid no license-fees. New York v. Broadway, etc. R. Co., 17 Hun. (N. Y.) 242.

But the corporate authorities have not this right of exacting license-fees independent of legislative authority; and where a city ordinance provided that a company pay a license-fee of fifty dollars for each car run by them, or become liable to a penalty, it was held not to be an exercise of municipal authority reserved by the terms of the grant, and that the penalty could not be imposed for non-compliance with an illegal exaction. Potter, J., based his decision upon a case of a similar character in New York v. Second Ave. R. Co. 32 N. Y. 261, an action brought to recover a penalty imposed by ordinance upon the proprietor of every passenger railroad car running in the City of New York below a certain street, which should not procure a license from the mayor and pay annually a fee of $50; wherein the court held that it was an imposition of an annual tax upon the company in derogation of its rights of property, and on that account was unlawful and void. New York v. Third Ave. R. Co. 33 N. Y. 42 (1865). With much less right could the municipal authorities impose such license fees after having entered into a contract with the company, prescribing the regulations to which the latter shall be subject, and requiring no further license, and reserving no right to require one; as, where an agreement was made by the city council of a municipal corporation with the street railroad company to that effect, it was held concluded by its contract from afterwards passing an ordinance requiring the taking out of a license and the payment of a fee by the company, as a condition precedent to the right to run its cars. "Such an agreement," said Judge Ingram, "is neither more nor less than a license, and if it confers a right to run cars in a certain manner through a specified portion of the city, no subsequent enactment can curtail that right." New York v. Second Ave. R. Co. 4 Barb. 41.

W. H. WHITTAKER.

WILL—CONSTRUCTION—LIFE-ESTATE OR FEE.

GREEN v. HEWITT.

Supreme Court of Illinois, November 26, 1880.

A clause in a will: "Second. After the payment of such debts and funeral expenses. I give and bequeath to my beloved wife, E T, the farm on which we now reside, situate, etc.; also, all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter, M T," was *held* to pass a life estate only to the widow, both in the real and personal estate, subject to being terminated by her marriage, and that the daughter took a vested remainder, and not a contingent one. The words "whatever remains" were held to apply only to the personalty which might be consumed, or lost, etc.

This was a bill in chancery, filed in the Scott County circuit court on the 12th day of December, 1878, by plaintiffs in error, against Amelia Hewitt, Ann Beedham and Sarah Royal, for the partition of certain lands. The bill alleges that Elizabeth Green died intestate on the 14th of November, 1878, leaving her husband, Benjamin Green, and her sisters, Amelia Hewitt, Ann Beedham and Sarah Royal; that at the time of her death Elizabeth Green was seized in fee of the premises mentioned in the bill; that she derived title to the same through the will of William C. Thompson, deceased, who was her former husband; that after his decease she married the said Benjamin Green; that upon the decease of the said Elizabeth Green, without issue, the said Benjamin Green, as surviving husband, became entitled to one-half of said premises, and her surviving three sisters to one-sixth respectively. By an amendment to the bill it was further alleged that the said William C. Thompson, at the time of his death, left him surviving his widow, Elizabeth Thompson, and Mary Thompson, his only daughter; that after her father's death the said Mary intermarried with Henry Abbott, by whom she had one child, and soon thereafter died, leaving her infant child and her husband, its father, her surviving; that the child survived its mother but a short time, when it died, leaving its father, the said Henry, as its only heir; that after the death of the said Mary Abbott, and her said infant child, the said Elizabeth Thompson was married to the said Benjamin Green, and remained his wife up to the time of her death; that said Abbott, husband of the said Mary Abbott, deceased, and father of her said child, still survives them. A copy of the will of the said William C. Thompson was annexed to and by ref-

erence made a part of the bill. At the April term, 1879, Henry Abbott, upon his own petition, was admitted without objection as a party defendant to the bill, and thereupon filed a demurrer to the same. At the October term, 1879, the court, upon argument and due consideration, sustained the demurrer to the bill, and complainants electing to stand by their bill, a decree was thereupon rendered dismissing the same. The defendants being dissatisfied with that decree, have brought the record to this court, and assigned for error the sustaining of the demurrer to the bill.

Mr. Owen P. Thompson and *Mr. John G. Henderson*, for the plaintiffs in error; *Mr. H. Case*, and *Mr. J. M. Riggs*, for the defendants in error.

Mr. Justice MULKEY delivered the opinion of the court:

The whole controversy in this case turns upon the construction to be given to the second clause of the will of William C. Thompson, through which all the parties claim. It is as follows: "Second. After the payment of such debts and funeral expenses, I give and bequeath to my beloved wife, Elizabeth Thompson, the farm on which we now reside, situate in said county, and known and described as the north-east quarter of the south-west quarter of section seven, township fifteen, range thirteen, also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter, Mary Thompson."

Plaintiffs in error insist that under this provision of the will Elizabeth Thompson took an absolute fee-simple estate in the premises therein mentioned, which are the same lands now in controversy, and of which partition is sought by complainants' bill. If she did not take an inheritance, as contended, but a mere life estate, as is claimed by defendants in error, then it is clear complainants showed no title to the premises in themselves, and the demurrer to the bill was therefore properly sustained by the court. To us there seems no room for doubt as to the proper construction of the clause in question. The devise of the farm and personal estate is expressed in a single sentence, one clause of which relating to the land, and another to the personalty. By their punctuation these clauses of the sentence are merely divided by a comma and are connected by the conjunctive adverb "also," which, in that connection, signifies in like manner, or in addition to; that is, the testator gives and bequeaths the farm, and in like manner gives and bequeaths the personalty. Then follows the qualifying or adverbial clause, "so long as she remains my widow," which is introduced for the purpose of limiting the entire gift, both of personalty and realty, to the widowhood of the taker. He gives and bequeaths both only so long as she remains his widow. This is both the grammatical and legal construction of the sentence. The meaning is precisely the same as if the testator had said: "I give and bequeath to my beloved wife, so long as she remains my widow, the farm, etc., on which we now reside, and in like manner I give and bequeath to her all my personal estate." She took a mere life estate in the entire gift. The misapprehension as to the legal effect of the devise doubtless grows out of the use of the expression, "whatever remains," by the testator, in limiting the remainder to his daughter. The use of that expression is of no vital significance, and can not be permitted to override the clearly expressed intention that the widow should take a life estate only. As part of the estate devised was personalty, it is but reasonable to suppose that some of it would be of that species of property whose value and use consist solely in its consumption, such as provisions, etc., and it was doubtless the intention and expectation of the testator that property of this character should and would be consumed by his widow, and of course not in existence when her estate terminated. It was also reasonable to suppose that if she lived long as his widow, some of the articles of personalty would be worn out, lost or destroyed; hence, in making the limitation over, it was but natural and proper to use the expression, "whatever remains." It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has.

It is further claimed by plaintiffs in error that the estate of the daughter was a contingent remainder, and that inasmuch as she died before the termination of the particular estate which supported it, it never vested at all. Counsel are entirely mistaken in this view. The estate of the daughter had not a single element in it that distinguishes a contingent from a vested remainder. There was certainly no uncertainty as to the person who was to take. It was Mary Thompson, the daughter, clearly. And the time of her taking in possession was equally certain, namely, when Elizabeth Thompson ceased to be the widow of the testator, whether it was effected by death or a second marriage. A clearer example of a vested remainder could scarcely be conceived. But admitting, for argument's sake, plaintiffs in error are right upon this question, the admission is certainly fatal to their right of recovery; for, if the danger took a contingent remainder, of necessity the widow could not have taken a fee, and their right of recovery rests entirely upon the hypothesis that she took a fee-simple title under the will.

We are, in any view, clearly of opinion that the decree of the circuit court was right, and it is, therefore, affirmed.

Decree affirmed.

INTERNATIONAL LAW—FEDERAL JURISDICTION IN BANKRUPTCY — ALIEN CREDITORS.

RUIZ v. EICKERMAN.

United States Circuit Court for Eastern District of Missouri, January, 1881.

A discharge in bankruptcy under the United States bankrupt act, is a bar to the claims of alien creditors suing in the courts of this country, in like manner as hough they were citizens of the United States.

On demurrer to plea of discharge.

Myers & Arnstein, for the demurrer; *Marshall & Barclay*, opposed.

TREAT, J., delivered the opinion of the court:

A demurrer is interposed to the answer of Eickerman, who pleads discharge in bankruptcy. The plaintiff is an alien non-resident, insisting upon his demand against the defendant, and that a discharge in bankruptcy under the laws of the United States does not relieve the defendant of plaintiff's demand.

The proposition involved pertains to international laws, concerning which there ought to be no discord. If the cases of insolvent laws, as among the States of this country *inter sese*, are considered, the fullest exposition of which is given in Cook v. Moffet, 5 How. 307; or, as to foreign demands, in Murray v. DeRotterhem, 6 Johns. Ch. 52, it will be ascertained that the rule is this: An insolvent law, or a bankrupt law, has no extra-territorial force. If the foreign party sues, despite the insolvent or bankrupt discharge, in the law of the forum, he must accept the rules pertaining thereto, with the exception of such modifications as spring from the complex nature of our State and Federal governments. As the laws of the Federal government in bankruptcy are supreme, a discharge thereunder is sufficient whether the creditor is a citizen of a State other than that in which the bankrupt is a resident, or is an alien, a resident of a foreign country. Of course there can be no extra-territorial operation of a United States statute as to the discharge of personal obligation. When the intra-territorial law has granted such a discharge as to all creditors, the foreign creditor suing in the domestic tribunal is subject to the *lex fori*, and his right to sue is dependent thereon.

The plaintiff in this suit had a cause of action against the defendant. The plaintiff was a non-resident and citizen of Spain, and as such could have recovered judgment. But defendant availed himself of provisions of the bankrupt act, under which the plaintiff could by proper proceedings have proved his demand and shared in dividends made. He elected not to do so, and, therefore, his demand is discharged as to this defendant, so far as the United States law operates—that is, within the territorial limits of the United States. The discharge in bankruptcy is valid in the absence of fraud in whatever court of the United States a suit is brought, although it may not protect the defendant from a suit brought in a foreign jurisdiction if he should be found therein. The demurrer to this special answer of Eickerman is overruled.

PROMISSORY NOTE — ALTERATION OF — ESTOPPEL BY DECLARATIONS.

KOONS v. DAVIS.

Supreme Court of Indiana, December, 1880.

The maker of a note is not estopped to set up the alteration of such note after the execution thereof, by any declarations he may have made to a purchaser of the same, unless at the time of making such declarations he had knowledge of the alteration of the note.

WORDEN, J., delivered the opinion of the court:

This was an action by John Davis, as the endorsee of D. C. Buchanan, against Aaron M. Flory, Williamson Wright and John M. Koons, on the following promissory note, viz.: "Logansport, Ind., Nov. 20, 1876. Four months after date we promise to pay to D. C. Buchanan, at the People's Bank, $794.70, with interest at the rate of ten per cent. per annum, and attorney's fees, value received, without any relief from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note. $794.70. (Signed) A. M. Flory, John M. Koons, Williamson Wright."

Such proceedings were had as that final judgment was rendered for the plaintiff against the defendants. Koons filed a fifth paragraph of answer, duly verified, alleging that after said note was executed and delivered to said Buchanan, said note, without his knowledge or consent, was altered by the erasure of the following words: "If suit be instituted on this note," then and there making the maker and this defendant, as one of his sureties, liable for attorney's fees, which before that they were not liable to pay. Wherefore, etc.

There is enough stated in the above paragraph of answer to justify the inference that the erased words followed the words "and attorney's fees." The erasure would change the legal effect of the note, because, as originally drawn, with the words "and attorney's fees, if suit be instituted on this note," it would be void as to attorney's fees, the condition being expressed in the note; whereas, the words being erased, the promise to pay attorney's fees being absolute, unless a condition be implied, it would be good. This is in accordance with the act of March 10, 1875. 1. R. S. 1876, p. 149. Churchman v. Martin, 54 Ind. 380.

To the paragraph above noticed, the plaintiff replied as follows: "2d. For a further reply of

the 5th paragraph of answer he says, that before he purchased said note, and after the payee thereof had offered it to him for sale, he had a conversation with said Koons in reference to his said proposed purchase of the same, in which conversation he informed said Koons that said note had been offered to him for sale, and he was about to buy it; and he asked said Koons if it was all right, and if there were any defenses to the same; and at the same time the plaintiff gave said Koons the date of said note, its amount, the rate of interest and attorney's fees, to all of which said Koons said he had no defense; and the plaintiff said that he relied upon said representations of said Koons and purchased said note, which he would not have done had not such representations been made. Wherefore," etc. Koons demurred to the foregoing paragraph of reply, and assigned for cause, "that said paragraph does not state facts sufficient to constitute a good and sufficient reply to the answer of the defendant." The demurrer was overruled and Koons excepted. Error is assigned upon this ruling.

We are of opinion that the reply was insufficient, and that the demurrer should have been sustained. Objection is made to the form of the assignment of the ground of demurrer; but that seems to us to have been sufficient. The reply, for the purpose of that pleading, admits the alteration of the note after its delivery; and the presumption is that the alteration was made by the party claiming under it, or by one under whom he claims, until the contrary is shown. Cochran v. Nebeker, 48 Ind. 459. See, also, Byles on Bills, Sharswood's Ed. top page 492.

The replication is radically defective in that it does not show that the alteration of the note was made before the plaintiff purchased it and took the indorsement to himself. It may, for aught that appears, have been made afterwards; and if so, it needs no argument to show that the defendant is not estopped to set up the alteration, by any thing alleged in the reply. But if we assume that the alteration was made before the note was purchased by the plaintiff, the reply is equally defeetive in not showing that, at the time of the alleged conversation between the plaintiff and Koons, the latter had notice of the alteration. We think it quite clear, on principle, as well as authority, that Koons can not be estopped to set up the alteration by any thing alleged in the reply, unless at the time of the conversation alluded to, he had notice of the alteration. Fletcher v. Holmes, 25 Ind. 458; Greensburgh, etc. Turnpike Co. v. Sidener, 40 Ind. 424; Long v. Anderson, 62 Ind. 537; Marion, etc. Gravel Road Co. v. McClure, 66 Ind. 468. See, also, Bigelow on Estop., 2d Ed. pp. 437, 461, 470.

The maker of a note, when applied to by a person proposing to purchase it, may well be supposed to know whether he has any existing defense arising out of the original transaction, or by way of set-off, and therefore be estopped to set up such defense, if he represent to the party proposing to purchase, that he has no defense, or make any equivalent statement, on the faith of which the purchase is made. In the case of Cloud v. Whiting, 38 Ala. 57, it was held that, "Where the maker of a note is inquired of by one wishing to purchase it, whether he has any defense against it, and answers that he has none, this estops him from setting up any defense which existed at the time, within his knowledge, but he does not thereby preclude himself from making a defense subsequently arising out of the original contract; such, for example, as a total failure of the consideration."

In the case before us Koons can not be presumed to have known that the note had been altered when the conversation between him and the plaintiff occurred. The reply alleges, to be sure, that the plaintiff gave him the date of the note, its amount, the rate of interest, and attorney's fees; but all this gave him no intimation that the note had been altered.

The judgment below is reversed with costs, and the cause remanded for further proceedings in accordance with this opinion.

CONTRIBUTORY NEGLIGENCE — PASSENGER IN BAGGAGE CAR—DEFECTIVE APPLIANCES.

KENTUCKY, ETC. R. CO. v. THOMAS.

Court of Appeals of Kentucky, December, 1880.

1. A passenger riding in a baggage car, when there is room in the passenger coaches, is negligent, and if, an accident happens in which, as the event shows, he would not have been injured had he remained in the passenger car, he can not recover, although his negligence may not have contributed to cause the injury.

2. The rule that requires a common carrier to provide sound and safe means of transportation is not without its limitations. It must be applied in each case with a due regard to the surrounding circumstances. The carrier must use such appliances and apparatus as skill shall make known, and experience shall show to be valuable in a considerable degree, if they can be procured at an expense not greater than ought to be incurred to obtain them. So much ought not to be required as to render the particular mode of conveyance impracticable.

A. H. Ward and *Stevenson & O'Hara*, for appellants; *J. Q. Ward* and *C. W. West*, for appellee.

COFER, C. J., delivered the opinion of the court:

June 21, 1876, while one of the appellant's passenger trains was proceeding on its way from Lexington to Covington, it came in collision with a herd of cattle straying on the track, and the engine, baggage and express car were wrecked, whereby Edwin M. Thomas, then traveling in the latter, was instantly killed. This action was brought by his personal representative, under sec.

1, ch. 57, of the Gen. Stats., to recover damages for the loss of the life of Thomas, on the ground that it was caused by the negligence of the agents and employees of the company. The answer admitted the death of Thomas, but denied the charge of negligence on the part of its agents and employees, and alleged that the decedent was himself guilty of negligence, but for which his life would not have been lost. A trial resulted in a verdict and judgment for the plaintiff, and the court having refused a new trial, the company has the case here for review.

Upon the question whether the agents and servants of the appellant engaged in running the train were guilty of negligence, in not preventing the wrecking of the train, the evidence was conflicting. The facts touching the alleged contributory negligence of the decedent are about as follows: He was in the employ of the Adams Express Company, and engaged in running as messenger between Lexington and Covington. On the day of his death he went from Covington to Nicholasville in charge of the express goods on the train. In the evening he started to return to Covington, in order to be there on the following morning to go out again in charge of freight. On his return trip he was not on duty as messenger, but that duty was performed by another. He paid no fare, but under the agreement between the express company and the railroad company, the former paid a gross sum for the transportation of its freight and messengers. There is a rule of the express company forbidding any one to ride in the express car except the messenger on duty, and there is also a rule of the railroad company that conductors and baggage-masters must not allow any person to ride in baggage, mail or express cars, whose duty does not require them to be there. The decedent went into the express car, and was riding there when the accident occurred. None of the passenger cars were thrown from the track, and no one in any of them was injured. There was plenty of room in the passenger car. It did not appear that the conductor knew the decedent was riding in the express car.

The most important questions in the case grow out of the action of the court in giving and refusing instructions. In the first instruction given for the plaintiff the court told the jury, in effect, that no fault on the part of the intestate, which did not contribute to the wrecking of the train, would authorize a verdict for the defendant, on the ground of contributory negligence, and refusing to instruct, as asked by the defendant, that it was the duty of the intestate to occupy a seat in one of the passenger coaches, and that if he went voluntarily into the express car, and it was more dangerous to ride in that car than in a passenger car, and that his life was lost in consequence of his being in the express car, they should find for the defendant.

That the intestate was a passenger and entitled to the privileges and subject to the duties incident to that relation, is not disputed. When the defense is contributory negligence, the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have occurred. In the first case the plaintiff would be entitled to recover; in the latter, he would not. Paducah, etc. R. Co. v. Hoehl, 12 Bush, 41. And this rule applies as well when the negligence of the plaintiff exposes him to the injury as when it co-operates in causing the misfortune from which the injury results. Doggett v. Illinois, etc. R. Co., 34 Iowa, 284; Colegrove v. New York, etc. R. Co., 20 N. Y. 492; Kentucky, etc. R. Co. v. Dills, 4 Bush, 590; Louisville, etc. R. Co. v. Sickings, 5 Bush, 1; McAunich v. Mississippi, etc. R. Co., 20 Iowa, 345. When a passenger enters a railway train he should take a seat in a passenger coach, if there is room; and if he voluntarily goes to a position of greater danger, and is injured, the question whether he is guilty of contributory negligence which will defeat his action will depend upon the nature of the misfortune which resulted in his injury. Lawrenceburgh, etc. R. Co. v. Montgomery, 7 Ind. 474.

Contributory negligence is a defense which confesses and avoids the plaintiff's case, and must be made out by showing affirmatively, not only that the plaintiff was guilty of negligence, but that such negligence co-operated with the negligence of the defendant to produce the injury. If a whole train be precipitated down an embankment, or through a bridge, into deep water, and a passenger seated in the express car is drowned, his representative will have the same right to recover as the representative of a passenger seated in a passenger coach. There would be no pretense for saying that, because the passenger in the express car was more exposed to danger in case of a collision with a train running in an opposite direction than he would have been in a passenger coach, he ought not to recover when it is clear that, as respects the misfortune which actually occurred, his danger was not at all increased by the fact that he was in the express car. So, also, of a large class of railroad disasters which result from the giving away of the track, or the breaking of some portion of a car. These are as liable to occur at one portion of the train as at another, and consequently a passenger is in no more danger of injury from such accidents in the express car than in a passenger car. O'Donnel v. Allegheny, etc. R. Co., 59 Pa. 250. And the fact that he was in that car when the accident occurred would not defeat his right to recover, unless, perhaps, the injury should result from some agency in that car which would not have existed in a passenger car. But there is another class of disasters, in which the danger may be greater in the express car than in a passenger car. Express cars are usually in advance of passenger cars, and in

case of collision with stock or other objects on the track, or with trains running in an opposite direction, the danger may be greater than in the express car.

The question of contributory negligence may be further affected by other facts. The conductor is, as to the train under his charge, the general agent of the company; and if a passenger be invited by him to occupy a position more dangerous than a seat in a passenger car, and the passenger is injured while in that position, the company could not defeat an action for the injury by a plea of contributory negligence. In such a case, the act of the conductor would be the act of the company. Burns v. Bellefontaine Ry. Co. 50 Mo. 139; Clark v. Eighth Ave. R. Co. 36 N. Y. 135. If a conductor requires a passenger to occupy a dangerous position, the company would be liable in the same manner as if it had itself given the order. Ordinarily, it is the duty of the conductor to warn a passenger known to be occupying a dangerous position on the train, and to request him to take a seat in the passenger car; and his failure to do so may sometimes be equivalent to the consent of the company that the passenger may occupy that position. Burns v. Railroad Co., 50 Mo. 139; Clark v. Eighth Ave. Co., 36 N. Y. 135. But he is not bound at the peril of the company to know that a passenger is in an exposed position, and, unless he does know it, the passenger has no right to complain that he was not warned. It is the duty of passengers to occupy the cars provided for them, and the conductor has a right to presume that they are doing so until he knows the contrary; and if a passenger goes into the baggage, mail or express car without the knowledge or consent of the conductor, he will not be permitted to urge as an excuse for remaining there, that the conductors hould have discovered him and ordered him back to his seat, but failed to do so. No one can be permitted to justify or excuse his own improper conduct by alleging that it was the duty of another to prevent such conduct on his part.

It seems to us, therefore, that when contributory negligence is interposed as a defense to an action against a railroad company for negligently injuring a passenger, and the supposed negligence consists in the fact that the passenger voluntarily occupied a position in the train which was more dangerous than the position he should have occupied, the nature of the accident causing the injury is to be considered; and if upon such consideration it appears that the danger of injury from that particular accident was materially increased by the fact that the passenger was in that particular place, instead of the place he should have occupied, he ought not to recover, unless he was there with the consent of the conductor. But if the nature of the accideut be such that the danger of injury was not enhanced in consequence of the position occupied by the passenger; or if the accident was of such a nature as was as likely to occur in one portion of the train as another; or if he occupied the place with the knowledge or consent of the conductor, his right of recovery will not be affected by the fact that he was at an improper place.

Applying these tests to the case before us, we are satisfied the court erred in telling the jury that no fault on the part of the intestate, which did not contribute to the wrecking of the train, would authorize them to find for the defendant, and in refusing instruction A asked by counsel for the appellant. Counsel for the appellee cite several authorities on this point, but none of them seem to bear directly upon the question. The case which comes nearest to this is O'Donnell v. Alleghany, etc. R.Co., 59 Pa. St. 239. In that case, it appeared that O'Donnell had been employed by the defendant to work on one of its bridges, and as part of his wages the defendant agreed to carry him to and from his home each day on its passenger train. After he had been thus engaged for near two months, during which time he generally rode in the baggage car, he was injured while riding in that car in consequence of giving way of the track. The trial court charged the jury that if the plaintiff rode in the baggage car by invitation or direction of the conductor, the fact of his being in that car would not affect his right to recover; but such invitation or direction should not be inferred from the mere fact that he had been accustomed to ride frequently in the baggage car with the knowledge and without objection on the part of the conductor. And further, that it was the duty of passengers to occupy the place provided for them; that baggage cars are designed for baggage and not for passengers; and any one possessed of intelligence sufficient to travel, should be held to know that the baggage car is not an appropriate place for passengers; and if a passenger chooses to leave his seat in the passenger cars and go into the baggage cars, he is guilty of negligence; and if it is shown to the satisfaction of the jury that such negligence contributed in a material degree to his injury, he could not recover. Commenting on this instruction, Agnew, J., said: "In view of the evidence, this instruction was erroneous. The plaintiff had been riding in the baggage car twice a day for about two months. Murphy, the conductor, himself admitted that Listons' men (of whom O'Donnell was one), rode frequently in the baggage car without his objecting; that he never ordered them out. When they got on that car, they generally remained without objection. That he had no recollection of requesting them to go into the passenger car, and that he had not at any time requested the plaintiff to leave the baggage car. * * * * Under these circumstances it cannot be justly said of them, as of ordinary passengers, 'that any one who is possessed of sufficient intelligence to travel should be held to know that the baggage car is not an appropriate place for passengers;' nor to say, although the consent of the conductor to ride there may be inferred from these facts, yet it does not follow that the company is liable, unless

it is shown that they were there at the invitation or by the direction of the conductor. * * * * "From the evidence in this case the jury might reasonably conclude that O'Donnell was in the baggage car with the permission of the conductor, and for the benefit of the company, and was rightfully there at the time of the accident." It is evident from this language that the court did not mean to decide that, being in the baggage car would not, under any circumstances, be such contributory negligence as would defeat an action by a passenger to recover for an injury sustained while riding in that car. On the contrary, it seems to us clear that the court entertained an exactly opposite opinion. After saying that the instruction was erroneous, in view of the evidence, the learned judge proceeds to state evidence from which the jury might have inferred that O'Donnell was riding in the baggage car not only with the knowledge and consent, but by the desire of the conductor. The suggestion that the evidence showed that the plaintiff had been riding in the baggage car twice a day for two months, with the knowledge of the conductor, and without objection on his part, shows that the court only meant to decide that the evidence would have warranted the jury in finding that he rode there with the consent of the conductor, and that if he did so, he was not guilty of contributory negligence; and this implies that, if he rode there without such consent, he was guilty. In Dunn v. Grand Trunk R. Co., 58 Me. 187; s. c. 10 Am. Law Reg., (N. S.) 615, the only negligence alleged was, that the plaintiff took passage on a saloon car attached to a freight train, contrary to a regulation of the company, forbidding the carrying of passengers on such trains. The conductor knew the plaintiff was in the car before the train started, but failed to direct him to get off, and, after the train started, received fare for a first-class passage. The company was held liable on the ground that it was the duty of the conductor to enforce the regulation, and having failed to do so, the company was bound by his acts and omissions, and became, as to the plaintiff, a carrier of passengers, and bound to the same extent as if the plaintiff had been injured on one of its passenger trains. In Edgerton v. New York, etc. R. Co. 39 N. Y. 227, the only negligence imputed to the plaintiff was that he took passage on the caboose attached to a freight train. The case showed that the company was in the habit of carrying passengers in that way, and as in Dunn's case, *supra*, the court held that it incurred the same liability as if he had been a passenger on a passenger train. In Carroll v. New York, etc. R. Co. 1 Duer, 571, it appeared the plaintiff rode in the baggage car with the consent of the conductor. Louisville, etc. R. Co. v. Mahoney, 7 Bush. 239, was an action under the third section of the statute for "wilful" negligence, and has no application here.

The plaintiff offered evidence conducing to prove that the Westinghouse air-brake was more efficient in arresting the progress of a train, than the brakes in use on the defendant's train on which the intestate was killed. The defendant objected and excepted, and assigns that action of the court as error. Railroad companies are held to a very high degree of care and vigilance in everything that pertains to the security of the lives and limbs of their passengers, and are held liable for even slight negligence on their part. They are bound to provide a road and engines and cars, free from all defects which endanger the lives of passengers, and which might have been discovered by the closest and most careful scrutiny of competent men, and to employ competent and trustworthy persons to operate and manage their roads, engines and cars, but are not liable for casualties which human sagacity can not foresee, and against which the utmost prudence can not guard. Nor have they discharged their whole duty when they have provided the things just mentioned. They are bound to add to them such apparatus and appliances as science and skill shall from time to time make known, and experience shall prove to be valuable in a considerable degree, in diminishing the dangers of railroad travel, provided such improvements can be procured at an expense not greater than ought to be incurred to obtain them. Taylor v. Railway, 48 N. H. 316; Tuller v. Talbot, 23 Ill. 357; Costello v. Syracuse R.Co., 65 Barb. 92; Smith v. New York, etc. R. Co., 19 N. Y. 127; 2 Redfield's Law of Railways, pp. 187-8-9, 3d Ed.; Ford v. London, etc.Railway, 2 F. & F., 730; Meier v. Railroad Co., 64 Pa. St., 230; Steinweig v. Erie R. Co., 43 N. Y. 123; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282. We have not anywhere met with a rule by which to determine, in a given case, whether it is the duty of a railroad company to provide a designated improvement for use on its trains. It is said, in substance, in Taylor v. Railway, *supra*, that the degree of care to be required is not to be measured by the revenues of the company, "but that in fixing a general standard of care and diligence, there should not be so much required as to render this mode of conveyance impracticable." The plaintiff in that case was injured in consequence of the breaking of one of the iron rails in the track. It was shown that the rail was much worn and battered, or broomed. The question was whether the company had not been guilty of negligence in failing to replace it with a better one. In such a case we quite agree that the question of due care is not to be measured by the revenues of the company. All companies engaging in the transportation of passengers must be required to provide a safe track and sound machinery and cars, and capable and trustworthy operatives. These are essential to a reasonable degree of safety, and a company unable to provide them should cease operations.

But it seems to us that it would be unreasonable to require companies of small means and business to provide every appliance or machine that may be found to be valuable in diminishing the

dangers of railroad travel, and which may come into general use on the great trunk lines, and lines connecting large cities, and carrying a thousand passengers while others carry a hundred. To adopt such a rule would be to drive many companies into bankruptcy, and to render it necessary to suspend operations altogether upon others. In Smith v. New York, etc. R. Co., 19 N. Y. 127, the court, speaking of the rule which requires railroad companies to avail themselves of all new inventions and improvements, the utility of which has been tested, used this language: "Undoubtedly the rule is to be applied with reasonable regard to the ability of the company and the nature and cost of such improvements; but within its appropriate limits it is a rule of great importance, and one which should be strictly enforced." The evidence showed that the defendant company, within the twelve months preceding the accident, had declared a dividend on its capital stock of $5,000,000. What the amount of the dividend was does not appear. It also appeared that the cost of the air-brake would have been $500 for each locomotive, and $200 for each car, or $12,000 or $15,000 for all of the company's engines and cars. The evidence also conduced to prove that the Westinghouse air-brake had been fully tested and its utility proved, and that it was in use on many roads in the United States, and gave general satisfaction. We are therefore of the opinion that the evidence offered on this point conduced to prove negligence on the part of the company, which contributed to the accident in which the intestate lost his life, and that it was properly admitted. That we may not be misunderstood, it is proper to remark that we do not intend to decide that a company able to do so is bound always to provide the very best improvement that may be known to practical men, but only that it must provide that which is reasonably good when compared with that which has been proved by proper practical tests to be the best.

Counsel also contend that the evidence was not admissible under the pleadings. The allegation is that the accident was occasioned by the negligence of the agents, officers, hands and employees of the defendant. This was sufficient to admit evidence of every fact conducing to prove that the disaster resulted either from the misfeasance or non-feasance of the company, or its agents or servants. Instructions 2 and 3 given for the plaintiff seem to be unobjectionable, and the instructions asked by the defendant, but not given, except that marked A, were properly refused.

Judgment reversed, and cause remanded for a new trial upon principles not inconsistent with this opinion.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

NATIONAL BANKS—ASSESSMENT OF STOCKHOLDERS IN CASE OF INSOLVENCY.—The first bank law was passed February 25, 1863. Ch. 58, 12 Stat. 668. The last clause of section 12, is as follows: "For all debts contracted by such association for circulation, deposits, or otherwise, each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares." In 1864, however, this provision was changed, and is now in force in these terms: "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stats. U. S. sec. 5151. The act of 1863 made no provision for enforcing the personal liability of the shareholder, that of 1864 provides for a receiver for that purpose. *Held*, that by the common law the individual property of the shareholder was not under any circumstances liable for the debts of the corporation; here the liability exists by virtue of the statute, and by the assent of the corporators to its provisions given by the contract which they entered into with congress in accepting the charter; that it is clear from the language of the statute that the liability of the shareholders is several, and can not be made joint, and that they are not guarantors or sureties "one for another," as to the amount that each might be required to pay. It was further *held*, that in case of insolvency of a National bank, in order to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain: 1. The whole amount of the par value of all the stock held by all the shareholders; 2. the amount of the deficit to be paid after exhausting all the assets of the bank; 3. then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not affect the liability of another; if the bank itself holds any of its own stock, it is to be regarded, in all respects, as if such stock were in the hands of a natural person, and the extent of the several liability of other stockholders is to be computed accordingly. Cites, Crease v, Babcock, 10 Met. (Mass.) 525; Atwood v. R. I. Agricultural Bank, 1 R. I. Rep. 376; *In re*, Hollister Bank, 27 N. Y. 393; Atkins v. Thornton, 19 Ga. 325; Robinson v. Lane, 19 Id. 337; Wiswell v. Starr, 48 Maine, 401; Morse on Banking, 503. Assessments made

by the comptroller contrary to the foregoing views, will be restrained by injunction. Kennedy v. Gibson, 8 Wall. 498, and Casey v. Galli, 94 U. S. R. 673, approved and the rule laid down in those cases reaffirmed. Affirmed. In error to the Supreme Court of the District of Columbia. Opinion by Mr. Justice SWAYNE. *United States, x rel. v. Knox.*

NAVAL OFFICER—DISMISSAL OF BY THE PRESIDENT—COURT OF CLAIMS—SEVENTH AMENDMENT—ACCEPTANCE OF PAYMENT UNDER PROTEST—COUNTER-CLAIM.—1. By the law in force on 20 June, 1866, the President had the power to dismiss from the army or navy any officer for any cause which, in his judgment, either rendered him unsuitable for, or whose dismissal would promote the public service. 2. On the 20th June, 1866, the President nominated to the Senate, Lieut. H, to be a first lieutenant in the Marine corps, *vice* Lieut. McE. The appointment was confirmed, and Lieut. H commissioned July 13, 1866. By the laws then in force, such appointment, followed by a commission, operated to discharge Lieut. McE from service as effectually as if he had been dismissed by direct order of the President under the authority conferred by the 17th section of the act of July 17, 1862. 12 Stat. 599. 3. The act of July 13, 1866 (14 Stat. 92), was not in effective operation, and did not control the President in the matter of dismissing officers of the army and navy, until on and after Aug. 20, 1866; on which day, in the sense of the law, the rebellion against the national authority was closed, and peace inaugurated. 4. The provision in the court of claims act of March 3, 1863, authorizing that court, without the intervention of a jury, to hear and determine claims against the Government; and also any set-off, counter-claim, claim for damages or other demand asserted by the Government against the claimant, does not violate the seventh amendment of the national Constitution. 5. A claimant received from the Government, the amount ascertained by the proper accounting officers to be due him, protesting at the time that he was entitled to a larger sum, and announcing his purpose not to be bound by such settlement of his accounts. He then sued the Government for the additional sum claimed by him. *Held*, that the Government was entitled to go behind the settlement of its accounting officers, and reclaim any sum which had been improperly allowed the claimant in such settlement. Affirmed. Appeal from the Court of Claims. Opinion by Mr. Justice HARLAN.—*McElrath v. United States.*

COUNTY BONDS—WHAT IS NECESSARY TO AUTHORIZE THEIR ISSUANCE.—In March, 1852, the legislature of Mississippi in chartering the Mississippi Central Railroad Company by secs. 17 and 18 of the act of incorporation, authorized certain designated counties to subscribe for stock in the company, and prescribed the mode in which the assent of the people should be signified. It directed that a tax should, with such assent, be levied and collected, and that each taxpayer, or his assignee, having a tax receipt for as large an amount as one share or more of the stock, should be entitled to receive in consideration thereof an amount in stock equal to the amount of tax paid by him. In 1859, the privileges by this act conferred upon certain counties for the benefit of the Mississippi Central Railroad Company, were extended to authorize county subscriptions to another railroad, which, having fallen into a state of inactivity, was revived in 1867, and in 1870 had its name changed to that of the Selma, Marion & Memphis Railroad Company. When these acts, except the last, which only changed the corporate name, were passed, the Mississippi Constitution of 1832 was in force, and this Constitution contained no limitation upon the powers of the legislature to authorize counties to subscribe for stock in railroads, or to pledge their credit in behalf of such corporations. In 1868, however, a new Constitution went into effect, which prohibited any county, city or town, from becoming a stockholder in, or lending its credit to, any corporation without the assent of two-thirds of the qualified voters signified in a special or regular election. On the 20th of November, 1869, at a special election held for the purpose, the people of Pontotoc County voted a subscription to the capital stock of the Memphis, Holly Springs, Okolona & Selma Railroad Company, which afterward became the Selma, Marion & Memphis Railroad Company, and under date of July 1, 1872, bonds to the amount of $150,000 were issued under the authority of the vote of 1869, but after that vote, and prior to the issuance of the bonds, to-wit, in April, 1872, a general act was passed authorizing counties, etc., to subscribe to the capital stock of railroads, two-thirds of the legal voters assenting, twenty year coupon bonds, bearing seven per cent. interest, were to be issued, taxes to meet interest and principal were to be levied and collected, and certificates of shares in the capital stock of the companies to be issued to tax payers to the amount paid by them. The plaintiff, being the holder of a large amount of the coupons of the Pontotoc bonds, brought suit upon them, and judgment being rendered against him as upon demurrer, he brought a writ of error. The controlling question was, whether there was authority in law for issuing the bonds. "It has been settled that, unless the power to issue bonds for the payment of municipal subscriptions to the stock of railroad companies is given in express terms, or by reasonable implication no obligation of that kind can be created." In Mississippi, supervisors of counties have no other financial powers than to "levy such taxes as may be necessary to meet the demands of their respective counties." Code 1880, secs. 2148, 2158. This gives no power to borrow money. Beaman v. Leake Co., 42 Miss. 247; Hawkins v. Carroll Co., 50 Miss. 762. The general legislation giving no authority for the issuance of the bonds, did the special legislation in this case afford it? Secs.

17 and 18 of the act of 1852, taken together, exclude the idea of issuing bonds to pay the subscription, as they authorize only a tax "for the payment of the capital stock so subscribed." No other mode of payment was provided for, and as the tax payer was entitled to stock to the full amount of his payment, it follows that the tax was intended to pay the subscription, and not bonds. *Held*, that the court below was right in the opinion that the issuance of bonds in this case was not authorized by law. Affirmed In error to the District Court of the United States for the Northern District of Mississippi. Opinion by Mr. Chief Justice WAITE.—*Wells v. Supervisors of Pontotoc County.*

JURISDICTION — APPEAL — CONFISCATION BY CONFEDERATE GOVERNMENT.—Plaintiffs in error being citizens of Pennsylvania in 1866, sued in a State court of Virginia defendant in error, as administrator of George Bruffy, deceased, who, at the time of his death, was a citizen of Virginia, for a debt contracted by him in 1861. The administrator pleaded, among other things, that between 1861 and 1865, his intestate had paid to a receiver, appointed under the authority of the Confederate States, the amount demanded as a debt due to an alien enemy, and by such payment was discharged from the debt to the plaintiffs. To this plea there was a demurrer which was overruled, and the case submitted upon an agreed statement of facts to the decision of the court. The sale and delivery of the goods, the residence of the creditors in Pennsylvania, of the debtor in Virginia during the war, and the payment of the debt as pleaded to a sequestrator appointed by Confederate authority, constituted the material facts included in the statement. The judgment of the Circuit Court was in favor of defendant, and the plaintiffs applied for a *supersedeas* to the Court of Appeals of Virginia in order to bring up the case for review. In Virginia the *supersedeas* is a substitute for a writ of error, and is in practice granted only when the court, upon inspection of the record, is of opinion that the decision complained of ought to be reviewed. In the case in question, the *supersedeas* was refused on the ground that the judgment of the court below was "plainly right," and to review this action of the Court of Appeals, a writ of error was prosecuted from the Supreme Court of the United States. Upon the hearing of the Supreme Court of the United States, the conclusion was arrived at, that the decision rendered by the Circuit Court in Virginia, and held by the Court of Appeals to be "plainly right," was erroneous, and the Supreme Court of the United States issued its mandate to the Court of Appeals, directing it to reverse its action and render judgment in accordance with the opinion of the Supreme Court of the United States. This the Virginia Court of Appeals declined to do, on the ground, elaborately stated, that under the laws of that State, and particularly under the Code of 1873, ch. 178, § 17, no appeal, writ of error or *supersedeas* shall issue, if, when the record is delivered to the clerk, two years shall have elapsed since the date of final judgmentt or decree. Upon the petition of plaintiffs in error to have the court give effect to its judgment, the case came up for hearing in the Supreme Court of the United States, and it was held that there having been a final judgment in the Virginia Court of Appeals, the jurisdiction of the Supreme Court of the United States attached; and inasmuch as the Virginia Court of Appeals finds itself embarrassed, the Supreme Court orders final judgment to be entered on its own record in favor of plaintiffs in error, reversing the judgment of the Circuit Court and of the Court of Appeals. Petition of plaintiffs in error to make judgment effectual. Opinion by Mr. Justice FIELD.—*Williams v. Bruffy.*

SUPREME COURT OF WISCONSIN.

November 30, 1880.

NEGLIGENCE — SUBMISSION TO THE JURY—WEIGHT OF EVIDENCE—MEASURE OF DAMAGES. —1. A refusal to submit specific questions for a special verdict, in the form proposed by the appellant, is not error where such questions are substantially submitted to the jury. 2. It is unnecessary to submit a question of fact to the jury when the fact itself is established by undisputed evidence. 3. An established custom in the management of a depot yard of a railroad company, that, in switching cars therein, it is not the company's duty to have a brakeman or other person upon each group of cars, or single car, separately in motion, to give warning of its approach to men at work in the yard, but that the men in such cases must look out for themselves—would not relieve a brakeman actually in charge of a moving car, who should see that it was approaching a workman upon the track, from the duty of stopping it or warning him of its approach; and, therefore, it would not relieve the company from liability to such workman for an injury thus caused, under ch. 173 of 1875. 4. A refusal to instruct the jury that the positive testimony of two witnesses that a warning of the approach of a car was given by the brakeman, "will outweigh the negative testimony of four that they did not hear it, provided the witnesses are all equally credible," was not error in this case, because it ignores the consideration of what opportunity each witness had of hearing the alleged warning, and because two witnesses did not testify positively that the brakeman gave such warning, nor was the negative testimony confined to four witnesses. 5. Just before the injury complained of, plaintiff was a laborer, a strong, healthy man, thirty-four years old, and he has a wife and four children. The injury made it necessary to amputate one leg above the knee; at the time of the trial, nearly a year after the accident, he was unable to do any work, and he testified that if he walked, stood, sat or kept his leg down for any length of time,

he became dizzy. In view of these facts, and of the physical and mental suffering involved in the injury, this court does not find in a verdict for $11,000 such evidence of prejudice, passion or improper bias in the jury, as justifies it in reversing a judgment for that sum. Opinion by LYON, J.—*Berg v. Chicago, etc. R. Co.*

CHATTEL MORTGAGE—STIPULATION THAT THE MORTGAGEE MAY TAKE POSSESSION.—1. Where a chattel mortgage provides that the mortgagee may take possession of the property in case he shall at any time deem himself insecure, and, in a litigation as to his right to the possession, he alleged and testified that he took possession because he deemed himself insecure, and there was no counter-proof: *Held*, that it was error to refuse an instruction asked by him to the effect that he was entitled to the possession. 2. Whether, in such a case, the mortgagor, in an action at law to recover possession of the property, could show that the mortgagee did not take possession because he deemed himself insecure, but for some other reason, is not here considered. 3. Where, in consideration of an extension of time for payment of rent past due, such a mortgage is given to secure such accrued rent, the mortgagee is entitled to take possession of the property, in case he deems himself insecure in respect to the accrued rent before the extended time for payment expires. 4. Where the note so secured is for rent to become due at a future day, whether even equity will interfere to restrain the exercise of such right before the rent is earned, on the ground that its exercise is not in fact necessary to the mortgagee's security, and will be highly detrimental to the tenant mortgagor, *quære;* but at least the mortgagor may assert such right at law. 5. Mortgagee's damages for the taking, by the mortgagor, of the mortgaged property, where the former was and is entitled to the possession, and a return of the property can not be had, are limited to the amount due upon the mortgage at the time of the trial. Opinion by TAYLOR, J.—*Evans v. Graham.*

INFANCY — EMANCIPATION BY INSOLVENT FATHER—REPLEVIN—EVIDENCE.—1. A father, though insolvent, may, by agreement with his minor son, relinquish his right to the services of the latter; and the son may thereafter acquire property, and hold it against the father or creditors. 2. In replevin against an officer who had attached the property in an action against a stranger, proof that plaintiff was in possession, claiming the property as his own, at the time of the seizure, is sufficient to maintain the action, in the absence of any evidence that the attachment defendant had any interest in the property. 3. In such a case, where plaintiff's evidence tended to show that the property had been purchased by her brother (a minor who had been emancipated by his father some time before the purchase), and that it had then been formally presented to her by her brother in the presence of friends: *Held*, that what was said on that occasion was admissible in evidence as a part of the *res gestæ;* and that the general circumstances of the family at the time might be shown, to corroborate the direct testimony in relation to such alleged purchase and presentation. 4. It seems that neither the original return of an officer to a writ of attachment, nor, as in this case, the statement of such return in the docket of the justice to whom it was made, can be received in evidence against the officer, without proof of the contents of the warrant; and that where the warrant and return are lost, their contents may be shown by parol. But these questions became immaterial here. Opinion by ORTON, J.—*Wambold v. Vick.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

October Term, 1880.

INDICTMENT—INTENT—VARIANCE.—Where an indictment alleged that the defendant broke and entered the building of the Warren Institution for Savings, "with intent then and therein to commit the crime of larceny, and the property, goods and chattels of the said corporation, in said building then being found, then and there in said building feloniously to steal, take and carry away," and the proof was of an intent to steal goods belonging to the United States in a part of the building leased and occupied for a post-office, which goods were in the exclusive custody and possession of the United States, and of which the Warren Institution for Savings had no property, general or special, no custody or possession: *Held*, that the indictment did not charge two intents, but a single intent; namely, to commit the crime of larceny by stealing the property of the Warren Institution for Savings, and that the variance between the indictment and the proof was fatal. Commonwealth v. Shaw, 7 Met. 52. Opinion by GRAY, C. J.—*Commonwealth v. Moore*

ADOPTION—STATUS OF CHILD ADOPTED IN ANOTHER STATE.—A child adopted, with the sanction of a judicial decree, and with the consent of his father, by another person, in a State where the parties at the time have their domicil, under statutes substantially similar to our own, and which, like ours, give a child so adopted the same rights of succession and inheritance as legitimate offspring in the estate of the person adopting him, is entitled, after the adopting parent and the adopted child have removed their domicil into this commonwealth, to inherit the real estate of such parent in this commonwealth upon his dying intestate here. Opinion by GRAY, C. J.—*Ross v. Ross.*

INDICTMENT—ONCE IN JEOPARDY—INTERESTED JUROR.—Where several defendants were jointly indicted, and severally pleaded in substance that at a previous term of court a jury was

empanelled and a trial commenced which, without their consent, was stopped by the court, and the case taken from the jury because one of the jurors was found to be surety upon a recognizance entered into by one of the defendants in this case, it was *held*, that it could not be said, as matter of law, that the judge was not justified in stopping the trial on the ground that the ends of public justice were liable to be defeated if the case was allowed to proceed to a verdict. Opinion by COLT, J.—*Commonwealth v. McCormick.*

CRIMINAL LAW—EVIDENCE—NEWSPAPER REPORT—REFRESHING MEMORY.—In the trial on an indictment for an assault upon M, a police officer, M was called as a witness for the government, and denied, upon cross-examination, that he had struck the defendant, or had knocked him down with his billy, or had ever so stated. The defendant, for the purpose of contradicting M, called as a witness one S, and offered to show by him that he, witness, was the regular reporter for the Boston *Daily Herald* of the daily proceedings in the municipal court of the City of Boston, for the transaction of criminal business; that he reported the proceedings in said court for the day when the defendant was examined in said court upon this charge; that M testified in said court at said time, and also made certain statements to witness at said time; that said report was made in part from the testimony in said case, and in part from said statements, and was printed in the evening edition of the Boston *Daily Herald* for that day, and that the original written report of the witness was destroyed. *Held*, that the witness was entitled, for the purpose of refreshing his memory, to look at the printed report. Opinion by ENDICOTT, J.—*Commonwealth v. Ford.*

INTOXICATING LIQUOR—UNLAWFUL KEEPING—DRUGGIST.—In the trial of a complaint for keeping and exposing for sale intoxicating liquors, with intent to sell the same unlawfully, it appeared that the defendant was an apothecary and druggist, and having no license to sell liquors. The jury found specially, that "the defendant kept the liquors only for the purpose of mixing them with other ingredients, according to prescriptions of physicians, to be used as medicine, and also for the purpose of manufacturing such compounds as are commonly used by druggists, to be sold for the purpose of being used as medicines for remedies for sickness and disease." The court instructed the jury that if the liquors were kept and used by the defendant solely for these purposes, he was guilty. *Held*, erroneous. The true test is whether the article sold is in reality an intoxicating liquor; if so, the sale is illegal, though sold to be used as a medicine, or sold under the disguise of a medicine. But if the article sold can not be used as an intoxicating drink, it is not within the prohibition of the statute, although it contains as one of its ingredients some spirituous liquor. Opinion by MORTON, J.—*Commonwealth v. Ramsdell.*

EQUITY—MORTGAGE—SALE—INVALIDITY.—The defendant having sold certain mortgaged premises under a power of sale contained in a fourth mortgage, the plaintiff brought his bill in eqnity to have the sale declared null and void, and to be allowed to redeem the mortgage. At the time of the sale the premises were subject to six mortgages; the fourth, fifth and sixth being held by the defendant. The fourth mortgage recited the amounts of the prior mortgages, and no question was made that the notice of sale was in conformity to the terms of the power. At the time of the sale, the auctioneer, with the sanction of the defendant, notified those present that the terms were cash, and that the defendant would himself pay the prior mortgages; and the presiding judge found "that the property offered for sale was not merely the right in equity which the plaintiff had to redeem from the defendant's mortgage, but the property was offered as if there was no previous mortgage or incumbrance of any kind, and that bids were made and received as if such were the fact." The property was struck off to an agent, through whom it was conveyed to the defendant. *Held*, that the sale was invalid, as the defendant had no power to sell the estate as if there were no previous mortgages or incumbrances upon it, and require those present to bid as if such were the fact. Opinion by ENDICOTT, J.—*Donohue v. Chase.*

SLANDER—MITIGATION OF DAMAGES—BAD CHARACTER OF DEFENDANT.—1. Where, in an action for slander, the evidence upon the question whether the defamatory words imputed to the defendant had, in fact, been uttered by him, was conflicting, it was *held*, that evidence of an attempt on the part of the defendant to corrupt by bribery one of the jurors who tried the action at a former trial, was admissible and competent as having a tendency to prove that the ground of defense was false and dishonest. 2. In such an action the defendant can not rely on his own bad character in mitigation of damages. Opinion by AMES, J.—*Hastings v. Stetson.*

STATUTE—PUBLIC URINALS—LAND-OWNER—DAMAGES.—Under Statutes 1876, c. 65, authorizing the City of Boston to construct urinals in the public streets, and providing that "any owner of land who suffers an injury to his property by reason of the construction of any urinal," may have his damages ascertained "in the manner provided when land is taken in laying out highways," it is the injury to his property, by reason of the construction of such a building, devoted to such a use, for which the owner may recover damages, and not damages for maintaining such a urinal in an improper manner, so as to become a nuisance. Opinion by ENDICOTT, J.—*Badger v. Boston.*

INDICTMENT—MURDER—ACCESSORY—FORMAL OBJECTIONS.—An indictment charged against one Infantino and one Ardito, the murder of one Frye with technical accuracy. It then sets forth *ipsissimis verbis* all the facts necessary to constitute

said crime, and alleged that the necessary acts charged were committed by the two persons above named, and concluded in these words: "And the jurors aforesaid, upon their oaths aforesaid, do further present, that Saro Chiovaro, Vincenzo Bandiera and Giuseppe Donato, before the said felony and murder was committted in manner and form aforesaid, to wit, on the 14th day of August in the year aforesaid, were accessories thereto before the fact, and then and there feloniously, wilfully, and of their malice aforethought, did counsel, hire and procure the said Infantino and the said Ardito, the felony and murder aforesaid, in manner aforesaid, to do and commit, against the peace," etc. The defendant, Chiovaro, pleaded guilty as accessory before the fact of murder in the second degree, and afterwards moved in arrest of judgment "that no offense known to the law is fully, plainly substantially and formally set forth and described to him, in and by said indictment, as required by law." *Held*, that the words "and the jurors aforesaid for the Commonwealth aforesaid, on their oaths aforesaid, do further present," do not necessarily denote a new count; and that under the statute of 1864, ch. 250, after the verification of the facts by the plea of guilty, the defendant's right to interpose formal objections, which existed prior to such verification, was precluded. Opinion by LORD, J.—*Commonwealth v. Chiovari.*

SUPREME COURT OF MISSOURI.

November, 1880.

NUISANCE—BAWDY HOUSE.—A bawdy house is a public nuisance *per se*, and a proper subject for a public prosecution, wherever situated. It may also become a private nuisance, and if kept adjoining the tenement of another, by reason of which his tenants leave, and his property is depreciated in value, he may maintain an action for the special damage which is sustained by him over and above the wrong and injury done to the general public. Affirmed. Opinion by HOUGH, J.—*Givens v. Van Studdiford.* S. C. 6 Cent. L. J. 6; 4 Mo. App. 498.

REVENUE—CITY OF ST. LOUIS—COMMISSIONS OF COLLECTOR — REPEAL OF ORDINANCES.—One Wright was collector of St. Louis City from April 10 to July 3, 1875, the beginning of the fiscal year, and plaintiff was such collector from July 3, 1875, to April 10, 1876, the end of the fiscal year. By the revised ordinance of 1871, the commissions of the collector were fixed at two and a-half per cent. up to $300,000, 3 per cent. on an additional $100,000, and 5 per cent. on all other sums collected in each fiscal year. The entire collections for the years 1875-6, were $472,044.60, of which Wright collected $129,404.89, and plaintiff, $342,639.71. The city paid plaintiff $8,565.97, for his commissions, and this suit is to recover $2,301.13, alleged to be still due, on the theory that plaintiff is entitled to compensation on the amount collected by him, at the same rate which would have been allowed on the whole sum collected, if no change in the person of the collector had taken place. *Held*, that the evident purpose and meaning of the ordinance of 1871 was, that the city should pay a certain per cent. of all moneys received by it through the office of the collector, during any fiscal year, no matter by whom collected. Said ordinance was not repealed by the ordinances passed in 1875 and 1876. Affirmed. Opinion by HOUGH, J.—*Lemoine v. City of St. Louis.*

ADMINISTRATION—APPEALS—TIME OF TAKING —ADJOURNMENTS -- COURT IN COURSE.-- The claim in question was allowed in the Probate Court of Morgan County, January 20, 1877, on which day court adjourned until February 5, 1877, and on that day until February 10, 1877, on which last day the following entry appears: "Saturday, February 10, 1877. Court opened pursuant to adjournment; present, J. C. Todd, judge, and W. H. Goddard, sheriff. Ordered that court adjourn until Monday, the 2d day of April next." Court met April 2, 1877, and the first entry reads: "Morgan Probate Court, April term, 1877." On the succeeding 10th day of April, the administrator presented an affidavit for an appeal from the above allowance, which appeal was refused by the court. This proceeding is by *mandamus* to compel the allowance of the appeal, and a peremptory writ was awarded below. The regular terms of the Morgan Probate Court are fixed by law on the first Mondays in January, April, July and October. Laws 1847, p. 32, sec. 9. By this act, appeals could be taken within thirty days after the rendition of the judgment. By the general law, appeals were to be taken during the term at which the judgment was rendered, or within ten days thereafter. Wag. Stat. p. 119, sec. 2. *Held*, that the adjournment made on February 10, 1877, to April 2, 1877, was an adjournment to the "court and course," and the appeal was not taken in time under either statute. This court will take judicial notice that the 2d day of April, 1877, was the first Monday in April, 1877. Brown v. Piper, 91 U. S. 42. An adjournment to "court in course," means to the day fixed by law for the beginning of the next regular term. Reversed. Opinion by HOUGH, J.—*State, ex rel. Sims v. Todd.*

SCHOOLS—ORGANIZATION OF CITIES—ILLEGAL TAXES—RELIEF OF TAX-PAYERS—INJUNCTION. —1. The City of Jefferson in September, 1867, assumed to organize into a separate school district, under G. S. 1865, chap. 47; and it was contended that this organization was void, because the voters of said city had, on a former occasion, declined to organize under said chapter. *Held*, that the organization was legal and valid. The State may, through its prosecuting officers, restrain by injunction a public corporation from

misusing granted powers, and from usurping those not granted. State, *ex rel.* v. Saline County 51 Mo. 350. But in such cases, the corporation proceeded against is supposed to have a legal existence, and the act complained of must be one which has not been consummated. When, as in this case, the legal existence of the corporation is assailed, and the acts complained of have been fully consummated, injunction by the State will not lie. In a proper case, the parties injured may have an injunction, but the State can not be made a party. Newmeyer v. Missouri, etc. R. Co., 52 Mo. 81; Overall v. Ruienzi, 67 Mo. 203. Affirmed. Opinion by HOUGH, J.—*State, ex rel. v. Board of Education of the City of Jefferson.*

LIMITATION — DISABILITIES — TENANCY BY COURTESY.—This action was brought in 1877, to have a deed declared void, as a cloud on plaintiff's title, made in 1851, twenty-six years before the commencement of the action. A demurrer to the petition was sustained below. The petition shows that the plaintiff is a grand-child of one Kirkpatrick, who died in 1847, and whose administrator made the deed in question. Plaintiff's mother was a minor at the date of the deed, and married and died during her minority, leaving plaintiff as her only child; but it does not appear whether her husband is dead or not. *Held*, that the tenancy by the courtesy stops the running of the statute against the wife. Dyer v. Brannock, 66 Mo. 422. But it is not shown that the husband of plaintiff's mother is yet dead. If he is still living, plaintiffs have no right of action; and if he died before his wife, the action is barred by the twenty-six years' uninterrupted possession shown. If he survived his wife, the action is not necessarily barred, unless he is still living. How these matters are the petition fails to state. Affirmed. Opinion by NAPTON, J.—*Embree v. Kirkpatrick.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

2. Are the bonds, issued by a mining company organized under the laws of Missouri, subject to seizure and sale upon execution in this State? LEX.
St. Louis, Mo., Jan. 13, 1881.

3. B. a duly qualified lawyer of the Supreme Court of Judicature in England, having practised law in London for nearly ten years, has recently settled in Kansas, and is desirous of being admitted to the bar of Bourbon County. Sec. 2 of the act regulating admission to the bar in Kansas, says: "Any person [being a] citizen of the United States" etc., may be admitted to practice, etc. B has declared his intention to become a citizen, and haa renounced his allegiance to the Sovereign of England, from which country he has come to Kansas. He is informed that, not having resided in the United States five years, he is not a citizen within the requirements of the "Attorneys at Law" Act, though he can, after six months' residence in the State, exercise the right to vote, and can hold other offices than attorney under the State., He will be obliged by any authority evidencing his right to admission to the bar.
Fort Scott, Kas., Jan. 12, 1881.

4. When answer day ig summons is made same day as return day, to what extent is summons defective and how taken advantage of in practice. X.
Harper, Kas., Jan. 13, 1881.

5. Where answer in filed three or four days after answer day, will judge permit answer to remain on file, when cause of the default in filing answer is simply the mistake of the attorney as to the answer day?
Harper, Kas., Jan. 13, 1881. X.

RECENT LEGAL LITERATURE.

THE CRIMINAL LAW MAGAZINE. A bi-monthly Periodical, devoted to the Interests of the Bench and Bar in Criminal Cases. Vol. I. 1880. Editors, Stewart Rapalje and Robert S. Lawrence. Frederick D. Linn & Co., Jersey City.

This handsome periodical is admirably adapted to meet the needs of that part of the profession to whom it is addressed. Each number consists of one or two leading articles upon some important and live topic of the criminal law, several important cases reported in full, and a digest of recent decisions in criminal cases. The six numbers, composing the first volume, which are now before us, are replete with matters of interest to practitioners in criminal courts. The work is well printed and handsomely bound, and, taken altogether, is a credit to the publishers and editors.

RHETORIC AS AN ART OF PERSUASION. From the Standpoint of Lawyer. By an Old Lawyer. Mills & Company, Des Moines, Iowa. 1880.

The subject with which this little work undertakes to deal, is one of absorbing interest, especially to the younger members of the profession, and it is to be regretted that the author has not been more successful in his attempt to direct the young lawyer in the acquirement of a facile and effective style in speaking. He promises boldly. In the course of a long and discursive preface, he says: "It occurred to me that if I could write with credit on any subject at all, I could use my pen to no greater advantage than to express my ideas briefly, but generally, concerning public speeches, whether at the bar or elsewhere, to instruct the student of oratory with the statement of

a few plain and practical rules which, if properly noted and observed, will most speedily conduct him successfully to the goal of his ambition."

A short analysis of the work will show the author's failure to realize this undertaking, and some of the reasons for it. The greater part of the first half of the book is occupied by a chapter on the "divisions of a speech," which, in our author's opinion, should be: 1. Exordium; 2. Statement of the case; 3. Argument, comprising (a) confirmation, and (b) confutation; 4. Peroration. Chapter III., which forms the bulk of the latter half of the volume, treats of the "figures of speech," among which are found the old familiars of our school-days: Metonymy, Synecdoche, Exclamation, Hyperbole, Apostrophe, Anthithesis, etc., etc. Then there is a chapter of Reflections on delivery, and some remarks by way of conclusion. In short, the effort may be summed up as an abortive, incomplete attempt towards a treatise upon formal rhetoric, a domain of literature of very questionable utility, in our opinion, in the formation of good writers or speakers. Such an analysis of the dry bones of formalism, even when carefully and faithfully achieved, will no more make a speaker than a close study of the metres of the Odes will form a Horace. A book of hints on the subject, telling the student how to study, where to find his models, describing the various methods of approaching different audiences, treating briefly the subject of the difficulties which are encountered in the acquirement of a forcible and graceful style in speaking, would, without doubt, be of great service to the younger members of the profession, and would be well received by them. But this work must be condemned for its lack of utility and its conspicuous failure to accomplish the end proposed.

NOTES.

On January, 13th inst., the President gave a State dinner in honor of the Justices of the Supreme Court. The State dining-room was elaborately adorned with choicest exotics, and the walls were enriched with tracery of delicate vines from the conservatory of the Executive Mansion. The entire porcelain service was used for the first time, forming the most conspicuous part of the furniture of the table, the embellishment of which was said to be more elegant and tasteful than at any previous State dinner given by President Hayes. The full Marine Band, stationed in the private dining-room of the mansion, furnished the music. The guests were Chief Justice and Mrs. Waite, Justice Swayne, Justice and Mrs. Miller, Justice and Mrs. Field, Justice and Mrs. Bradley, Justice and Mrs. Harlan, Justice Woods, ex-Justice and Mrs. Strong, Senator and Mrs. Edwards, Senator and Mrs. Carpenter, Senator David Davis, Senator and Mrs. Pendleton, Representatives Robinson, Williams and wife, Reed and wife, and Tucker and wife. Besides these representatives of the Senate and House Judiciary Committees there were present Attorney-General Devens, Secretary of War Ramsey, Mr. Whitelaw Reid, the President, Mrs. Hayes and her young lady guests Misses Morgan, Mills and Scott.

——The following is a part of an advertisement from a London law journal: "A gentleman, who has had the entire charge of several heavy cases in litigation, and who has just returned from a tour round the world, which he has made on behalf of an eminent firm of solicitors in Lincoln's Inn, having brought to a successful issue the object of his mission, is prepared to undertake the getting up of evidence and the obtaining of reliable information in any litigious matter of importance." "For obvious reasons" he omits his name and address. This is rather ahead of Yankee "enterprise."

——Indulgent public opinion might have recorded a unanimous verdict of acquittal in the case of the audacious young man who took upon himself to run away with and marry a ward in chancery, had it not been for the very reprehensible course he thought fit to adopt in misrepresenting the young lady's age to the clergyman who sealed the nuptial bond. She was twenty-two, he averred, whereas she turned out to be only nineteen; and, to add to the enormity of his offense, he further represented himself to have slept for three weeks in a parish which he had, as a fact, only honored by a perfunctory sojourn of a single night. As Vice-Chancellor Malins pointed out, there is a lamentable laxity about a system which enables two romantic young people, neither of them past legal infancy, to get married by making false declarations of age, with no further questions asked. In the case of Mr. Metzgar, who perpetrated this particular fraud upon the cleric, he had been previously prohibited by the court of chancery from holding any communication whatever with the object of his affections; so when he deliberately carried her off and married her, his conduct may have had a touch of romance about it, but it was quite certain to receive punishment. The marriage is now valid, but the unfortunate bridegroom is in prison, a victim to the offended dignity of the court of chancery, and only after a period of jail discipline and the humblest apologies, is there any chance of his being liberated. It is quite right the chancery judges should keep a very sharp eye on the doings of infants, as they are the official guardians of all minors in the country, as well as those who, by virtue of their fortunes, are in the peculiar condition of "wards of court;" but it may be hoped that the amorous desperation which has landed the unfortunate bridegroom in a jail, will carry him cheerfully through his confinement, and restore him afterward—a wiser, if a sadder, man—to the society of his ill-won bride.